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INTERNATIONAL PRELIMINARY EXAMINATION REPORT (PCT Article 36 and Rule 70)

Applicant's or agent's file reference NO 7337/WO/PCT		FOR FURTHER ACTION See Notification of Transmittal of International Preliminary Examination Report (Form PCT/PEA/416)	
International application No. PCT/EP 03/09852	International filing date (day/month/year) 05.09.2003	Priority date (day/month/year) 19.09.2002	
International Patent Classification (IPC) or both national classification and IPC B67D5/42			
Applicant NESTEC S.A. et al.			

1. This international preliminary examination report has been prepared by this International Preliminary Examining Authority and is transmitted to the applicant according to Article 36.
2. This REPORT consists of a total of 7 sheets, including this cover sheet.
 - ☐ This report is also accompanied by ANNEXES, i.e. sheets of the description, claims and/or drawings which have been amended and are the basis for this report and/or sheets containing rectifications made before this Authority (see Rule 70.16 and Section 607 of the Administrative Instructions under the PCT).

These annexes consist of a total of sheets.

3. This report contains indications relating to the following items:
 - I ☒ Basis of the opinion
 - II ☐ Priority
 - III ☒ Non-establishment of opinion with regard to novelty, inventive step and industrial applicability
 - IV ☐ Lack of unity of invention
 - V ☒ Reasoned statement under Rule 66.2(a)(ii) with regard to novelty, inventive step or industrial applicability; citations and explanations supporting such statement
 - VI ☐ Certain documents cited
 - VII ☐ Certain defects in the international application
 - VIII ☐ Certain observations on the international application

Date of submission of the demand 26.01.2004	Date of completion of this report 23.09.2004
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**INTERNATIONAL PRELIMINARY
EXAMINATION REPORT**

International application No. **PCT/EP 03/09852**

I. Basis of the report

1. With regard to the **elements** of the international application (*Replacement sheets which have been furnished to the receiving Office in response to an invitation under Article 14 are referred to in this report as "originally filed" and are not annexed to this report since they do not contain amendments (Rules 70.16 and 70.17)*):

Description, Pages

1-13 as originally filed

Claims, Numbers

1-12 as originally filed

Drawings, Sheets

1/4-4/4 as originally filed

2. With regard to the **language**, all the elements marked above were available or furnished to this Authority in the language in which the international application was filed, unless otherwise indicated under this item.

These elements were available or furnished to this Authority in the following language: , which is:

- ☐ the language of a translation furnished for the purposes of the international search (under Rule 23.1(b)).
☐ the language of publication of the international application (under Rule 48.3(b)).
☐ the language of a translation furnished for the purposes of international preliminary examination (under Rule 55.2 and/or 55.3).

3. With regard to any **nucleotide and/or amino acid sequence** disclosed in the international application, the international preliminary examination was carried out on the basis of the sequence listing:

- ☐ contained in the international application in written form.
☐ filed together with the international application in computer readable form.
☐ furnished subsequently to this Authority in written form.
☐ furnished subsequently to this Authority in computer readable form.
☐ The statement that the subsequently furnished written sequence listing does not go beyond the disclosure in the international application as filed has been furnished.
☐ The statement that the information recorded in computer readable form is identical to the written sequence listing has been furnished.

4. The amendments have resulted in the cancellation of:

- ☐ the description, pages:
☐ the claims, Nos.:
☐ the drawings, sheets:

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5. ☐ This report has been established as if (some of) the amendments had not been made, since they have been considered to go beyond the disclosure as filed (Rule 70.2(c)).

(Any replacement sheet containing such amendments must be referred to under item 1 and annexed to this report.)

6. Additional observations, if necessary:

III. Non-establishment of opinion with regard to novelty, inventive step and industrial applicability

1. The questions whether the claimed invention appears to be novel, to involve an inventive step (to be non-obvious), or to be industrially applicable have not been examined in respect of:

☐ the entire international application,

☐ claims Nos.

because:

☐ the said international application, or the said claims Nos. relate to the following subject matter which does not require an international preliminary examination (specify):

☒ the description, claims or drawings (*indicate particular elements below*) or said claims Nos. 5 are so unclear that no meaningful opinion could be formed (*specify*):

see separate sheet

☐ the claims, or said claims Nos. are so inadequately supported by the description that no meaningful opinion could be formed.

☐ no international search report has been established for the said claims Nos.

2. A meaningful international preliminary examination cannot be carried out due to the failure of the nucleotide and/or amino acid sequence listing to comply with the standard provided for in Annex C of the Administrative Instructions:

☐ the written form has not been furnished or does not comply with the Standard.

☐ the computer readable form has not been furnished or does not comply with the Standard.

V. Reasoned statement under Article 35(2) with regard to novelty, inventive step or industrial applicability; citations and explanations supporting such statement

1. Statement

Novelty (N)	Yes: Claims	1-4, 7-12
	No: Claims	
Inventive step (IS)	Yes: Claims	
	No: Claims	1-4, 7-12
Industrial applicability (IA)	Yes: Claims	1-4, 7-12
	No: Claims	

2. Citations and explanations

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ITEM VI

1. Dependent claim 5 does not meet the requirements of Art. 6 PCT (clarity).

The "initial pressure in the freezer" is undefined in claim 5 (nor in claim 1) as it is neither clear at which method step the product is introduced into the freezer, nor if the product is introduced into the freezer together with the container.

It is therefore impossible to examine claim 5 for novelty and inventive step.

Claim 5 does not meet the requirements of Article 6 PCT in that the matter for which protection is sought is not clearly defined.

ITEM V

2. Claims 1-4 and 7-12 do not fulfill the requirements of Art. 33(3) EPC (inventive step).

2.1 Claim 1

Document **US-A-3 677 443**, hereinafter referred to as **D1**, is regarded as being the closest prior art to the subject-matter of claim 1 and discloses :

Method of packaging a thick but malleable frozen dessert, and for dispensing it under pressure in the expanded state, in which method the product is placed in a container 12 equipped with a dispensing member 18, 22, then, after having put the said dispensing member in the closed position, the said container is pressurized by a propellant gas (column 3 lines 64-66, column 4 lines 6-10) to a pressure high enough to ensure suitable dispensing (column 4 lines 42-44), given the consistency of the product to be dispensed and characteristics of the dispensing member, wherein:

- a) a propellant gas (column 4 lines 47-51) is chosen;
- b) an expansion gas (column 4 lines 54-60) is chosen in order to expand the product when it is dispensed, the amount of expansion gas used being defined depending on the degree of expansion desired on dispensing, the expansion gas being homogeneously dissolved in the product to be dispensed by putting the expansion gas in contact with the said product in a freezer (26, 28, 34) and
- c) the passage of the said product takes place in the pasty state then it is

dispensed by opening the dispensing member 18, 22, the said product being expanded to the desired degree, determined prior to filling, as described in step b), by expanding the expansion gas (column 4 lines 55-58) which is completely dissolved therein.

- The subject-matter of claim 1 therefore differs from this-known in D1 in that:
1. the propellant gas is virtually insoluble in the product to be dispensed;
 2. the expansion gas is highly soluble in the product to be dispensed.

The technical problem to be solved by the method as defined in claim 1 can be defined as how to obtain a more effective expansion of the product.

D1 (column 4 lines 47-51) clearly distinguishes between the propellant function and the expansion function of the gases and suggests that it is not necessary to mix propellant directly with the product to be dispensed. In order to solve the technical problem, a skilled practitioner would consider document **EP-A-1 061 006**, hereinafter referred to as **D2**, wherein it is said that insoluble gases are particularly suitable to be used as propellant and soluble gases such as CO₂ and N₂O are suitable to be used for expanding the product (overrun) (§0007; claim 7).

The subject matter of claim 1 is an obvious combination of the method disclosed in D1 and the teachings of D2 and does therefore not substantiate an inventive step as required by Art. 33(3) PCT.

2.2 Dependent claims 2 - 4 and 7-12

The features and method steps of dependent claims 2-4, 7, 9-11 are well established in the art for the same purposes of the present invention:

claim 2 (the temperature and pressure values have been considered as merely optional by the term "especially"): WO-A-95 29597 claim 1;

claim 3: D2 claim 7;

claim 4: JP-A-03061450, abstract;

claim 7: implicit from D1 column 4 lines 51-57 (for the assessment of novelty and inventive step, in the light of the description it has been assumed that the product has been partially pressurised before being introduced into the container.

claims 9, 10: D1 column 4 lines 6-10;

claim 11: D2, claim 5;

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The features of claims 8 and 12 are routine measures and do therefore not contribute to inventive step (N.B.: The piston of claim 8 lacks an antecedent and is undefined in its functional relationship with the container. Therefore claim 8 should depend on claim 11).

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